

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

CORAIZACA,)	
Complainant,)	
)	
v.)	8 U.S.C. §1324b Proceeding
)	Case No. 90200337
)	
YESTERDAY'S RESTAURANT,)	
Respondent.)	

DECISION AND ORDER GRANTING DEFAULT JUDGMENT
TO COMPLAINANT, BUT RESERVING DECISION AS TO
RELIEF TO BE GRANTED
(March 13, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearance: Juan Coraizaca, Complainant.

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended. Juan Coraizaca, Complainant, charges that Yesterday's Restaurant, Respondent, unlawfully discriminated against him when it discharged him in April 1990 from his position as dishwasher. Complainant filed a Complaint to that effect on November 9, 1990 in the Office of the Chief Administrative Hearing Officer. This Office served on Respondent on November 26, 1990 a Notice of Hearing which transmitted a copy of the Complaint. Despite the caution expressed in that Notice that failure to answer within 30 days after receipt of the Complaint might lead to a judgment of default and other relief, no answer was timely or ever filed by or on behalf of Respondent.

Instead, I received a letter filed December 20, 1990 from an individual named Jean DeBickero who disclaims any ability to provide an answer, reciting that the restaurant "is under new ownership." On December 24, 1990 I issued an order reciting receipt of that letter (together with return of the Notice of Hearing and Complaint), stating as follows:

Regardless of De Bicker's (sic) relationship with Yesterday's Restaurant, past or present, the duty to respond to the Notice of Hearing and Complaint is presumptively on the restaurant and its present proprietor. It is incumbent upon the present owner of Yesterday's Restaurant to answer the Complaint in accordance with the Rules of Practice and Procedure for this Office, 28 C.F.R. Part 68.

Because of the apparent confusion by the present owner of Respondent Yesterday's Restaurant, I grant Respondent an additional thirty (30) days from the date of this Order in which to file an Answer to the Complaint. Respondent is cautioned that failure to answer may be deemed failure to appear and contest the allegations of the Complaint and may be the basis for entering a judgment by default against Respondent in favor of Complainant. 28 C.F.R. §68.8(b) (1990). [Emphasis in original].

Respondent failed to reply to the December 24, 1990 Order. I did, however, receive a letter dated January 11, 1991 from Ms. Jean DeBickero which I acknowledged as follows in an order issued January 16, 1991:

Ms. DeBickero states: "I am unable to provide answers as I need the questions." (Emphasis in original). Ms. DeBickero indicated in her December 18, 1990 letter that she is not the owner of Respondent Yesterday's Restaurant. Her January 11 letter states that Respondent Yesterday's Restaurant is owned by Albert Rampza.

The January 16, 1991 Order provided the following directions:

The owner, not Ms. DeBickero, should answer the complaint unless the owner designates her as Respondent's representative. Accordingly, because it is unclear whether Ms. DeBickero is authorized to represent Respondent, copies of the Notice of Hearing, Complaint and Order of December 24, 1990 are enclosed with this Order and mailed to Respondent, in care of Albert Rampza and also to Ms. DeBickero.

Acknowledging that there were questions as to who should answer the Complaint, recognizing that the Respondent was not represented by counsel, my January 16 Order extended the filing of an answer to the Complaint until February 4, 1991. Respondent was put on notice that whether or not Complainant has a valid case to present, Respondent's failure to answer timely may result in entry of judgment of default in favor of Complainant.

Notwithstanding the several opportunities provided to Respondent to answer the Complaint, and no answer having been filed, I issued on February 12, 1991, an Order To Show Cause Why Judgment By Default Should Not Issue. That Order required

Respondent to show cause why judgment by default should not issue, providing an opportunity to make such showing by February 22, 1991. The Order concluded with a warning that contingent upon the contents of such filings, if any, "I may enter a judgment of default in favor of Complainant with no further opportunity for Respondent to answer or otherwise defend against the Complaint."

Respondent has been sufficiently cautioned by the Notice of Hearing and by my Orders of December 24, 1990, January 16, 1991 and February 22, 1991, that failure to respond may be cause for entry of a default judgment. No answer has been filed. I find and conclude that Respondent Yesterday's Restaurant is in default, having failed to plead or otherwise defend against the allegations in the complaint. 28 C.F.R. §68.8(b) Based upon Respondent's failure to answer the allegations set forth in the Complaint, I find all the allegations are admitted by Respondent. 28 C.F.R. §68.8(c)(1). Freeman v. Mexico Studio, OCAHO Case No. 90200292 at 2 (January 30, 1991); U.S. v. Educational Employment Enterprise, OCAHO Case No. 90200242, (Decision and Order at 3) (October 30, 1990). I conclude, therefore, that Respondent has violated 8 U.S.C. §1324b as alleged by Complainant.

Upon concluding that Respondent has violated 8 U.S.C. §1324b, I have discretion to award reinstatement and back pay to Complainant. 8 U.S.C. §1324b(g)(2). See also 8 C.F.R. §68.50(c)(1)(i)(C). The injured party is to be reinstated to the position he would have had absent the discriminatory conduct. See Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 at 20 (June 29, 1990) citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Franks v. Bowman, 424 U.S. 747, 764 (1976) (further citations omitted). In fashioning such relief, the judge may order reinstatement of a wrongfully discharged employee. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978). Here, Complainant has specifically requested such relief as reemployment as a dishwasher. It is the exceptional case where reinstatement is not ordered. Nord v. United States Steel Corp., 758 F.2d 1462, 1470 (11th Cir. 1985); Garza v. Brownsville Independent School Dist., 700 F.2d 253, 255 (5th Cir. 1983). No exceptional circumstances are evident on this meager record. To arrest such discrimination and to make Complainant whole, Respondent will be expected to reinstate Complainant to the position from which he was unlawfully discharged, at the prevailing wage and with commensurate benefits. Jones, OCAHO Case No. 88200202 at 20. Cf. Freeman, OCAHO Case No. 90200292 at 3.

An order for payment of back wages is typical to compensate a discriminatee for earnings lost as a result of unlawful discrimination. Jones, OCAHO Case No. 88200202 at 21; see U.S. v. Mesa Airlines, OCAHO Case Nos. 88200001-2 at 56-59 (July 24, 1989). The back pay remedy has the dual purpose of reimbursing a claimant for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in

detering such discharges. Jones, OCAHO Case No. 88200202 at 21, citing N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

A prevailing discriminatee, such as Complainant, however, has a duty to mitigate damages by reasonable diligence in seeking employment substantially equivalent to the position he lost. Ford v. EEOC, 458 U.S. 219, 231 (1982). An award of back pay is reduced by the amount of interim earnings or amounts earnable "with reasonable diligence by the individual . . . discriminated against" 8 U.S.C. §1324b(g)(2)(C). See Freeman, OCAHO Case No. 90200292 at 3.

This Decision and Order provides an opportunity for Complainant to make such showing. See Educational Employment Enterprise, OCAHO Case No. 90200242 (Final Decision and Order) (January 2, 1991). In his complaint he made no such showing as to either the salary he earned during the time he was employed by Respondent, or as to his efforts at finding employment subsequent to his discharge by Respondent.

Complainant will be expected to file an affidavit in support of his demand for back pay. That affidavit should recite: (a) his rate of pay, gross and net, with Respondent; (b) the dates of hire and discharge by Respondent; (c) interim earnings, i.e., money earned from the date of discharge by Respondent until the date of his response to this Order; (d) identify all employers by address and pay rate, the dates of each employment and the amount of pay received; (e) specify any periods of unemployment; (f) state efforts in obtaining other employment; and (g) specify any unemployment compensation received.

The affidavit must be filed with the Judge not later than April 19, 1991, with a copy to Respondent. The Complainant should certify that such copy was mailed or delivered to Respondent. The certificate of service should accompany the filing of the affidavit with the Judge.

In addition to the findings and conclusions already stated it is also found and concluded:

(1) That Respondent is in violation of 8 U.S.C. §1324(b) with respect to the discriminatory discharge of Juan Coraizaca on or about April 26, 1990, based upon his citizenship status and national origin.

(2) That Respondent cease and desist from the discriminatory practice described in the Complaint.

(3) That Respondent comply with the requirements of 8 U.S.C. §1324(b) with respect to individuals hired for a period of three years from the date of this Order.

(4) That Respondent retain for a period of three years the names and addresses of each individual who applies, either in person or in writing, for employment in the United States, to any business entity associated with Respondent.


(5) That Respondent post notices to employees about their rights under 8 U.S.C. §1324b, and employer's obligations under 8 U.S.C. §1324a.

(6) That Respondent reinstate Juan Coraizaca.

(7) That I retain jurisdiction of this case to determine what, if any, back pay Complainant is entitled to, such determination to depend upon the filing, if any, by Complainant to this Decision and Order, as provided for above.

SO ORDERED.

Dated this 13th day of March, 1991.



Marvin H. Morse
Administrative Law Judge